

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-090423
	:	TRIAL NO. B-0806533
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
CLAUDE PAYNE,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Following a jury trial, defendant-appellant Claude Payne was found guilty of the aggravated murder of Franklin Phifer, an accompanying gun specification, and having a weapon while under a disability. Payne received an aggregate sentence of 33 years' to life imprisonment. This included 30 years' to life imprisonment for the aggravated-murder conviction, a consecutive three years' imprisonment for the gun specification, and a concurrent five years' imprisonment for the offense of having a weapon while under a disability. Payne now appeals.

On August 1, 2008, Franklin Phifer was shot repeatedly and died from his injuries. The following evidence was presented during Payne's trial for the murder of Phifer. Rose Coleman testified that she resided at 140 Huntington Place in Cincinnati, and that Phifer was shot in her front yard. Immediately preceding the shooting, Phifer had left Coleman's home on his bicycle after speaking with her on her porch. As Phifer

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

started off, Coleman heard a gunshot and witnessed Payne running behind Phifer while shooting at him. Coleman dove for cover on her porch, but was able to view the shooting through the slats. Phifer ran towards her home, and as he collapsed in her front yard, Payne approached him and fired another shot.

Coleman recognized Payne as the shooter and explained to the jury that Payne's family lived on her street. Coleman knew Payne by the first name of Lorenzo and hence identified Phifer's shooter as "Lorenzo" when she called 911. As she made the emergency call, Coleman witnessed Payne's van, which had previously been parked on her street, pulling away. Approximately a week after the shooting, Coleman identified Payne as the shooter in a photographic lineup.

The state presented the testimony of Diondre Whitehead, Rose Coleman's next-door neighbor, in a video deposition. Whitehead testified that he had known Payne for years, and that Payne had visited with him prior to Phifer's shooting on August 1. According to Whitehead, on that date he had heard gunshots while sitting on his porch. He ran inside for safety, but through his window witnessed Payne stand over Phifer and shoot him in Coleman's yard. He further saw Phifer attempt to block the gunshots with his hands. Whitehead testified that he had purposely avoided the police for several days due to his fear of retaliation, but that he had eventually named Lorenzo Payne as Phifer's shooter and identified him in a photographic lineup.

Deputy Coroner Gretel Stephens testified that Phifer had suffered at least four gunshot wounds. She identified two gunshot wounds to Phifer's chest, a defensive wound to his right middle finger, a wound to his upper left calf, and a grazing wound to his right buttock. Stephens further testified that no stippling had been present, and that Phifer had not been shot from a distance closer than two feet.

Payne put forth an alibi defense, alleging that he had been at his grandparents' house, also on Huntington Place, at the time of the shooting. Payne's grandfather

Claude Hargrove testified that he had been on his front porch with Payne when the two heard gunshots. They immediately entered the house after hearing the shots. Both Payne's grandmother Caree Hargrove and his uncle Barry Hargrove provided similar testimony, stating that Payne had been on the front porch on August 1, but had run inside after hearing gunshots. Payne testified on his own behalf. He denied shooting Phifer and insisted that he had been on his grandmother's porch at the time of the shooting. With respect to Rose Coleman's testimony that she had seen Payne's van drive away immediately after the shooting, Payne offered contradictory testimony from his stepfather Arthur Lacey. Lacey testified that he had borrowed Payne's van on the day of the shooting, and that it had been in his possession the entire day.

In his first and second assignments of error, Payne argues that his convictions for aggravated murder and having a weapon while under a disability were against the manifest weight of the evidence and were not supported by sufficient evidence. R.C. 2903.01(A) prohibits aggravated murder and states that "[n]o person shall purposely, and with prior calculation and design, cause the death of another."

Both Rose Coleman and Diondre Whitehead testified that they had witnessed Payne shoot Phifer. Whitehead also indicated that Payne had been on the street prior to the shooting, and Coleman saw Payne's van pull away from the scene immediately thereafter. The evidence further revealed that Payne had purposely chased down Phifer, firing at him repeatedly. Following our review of the record, we conclude that Payne's conviction for aggravated murder was supported by sufficient evidence.²

We further conclude that Payne's conviction for aggravated murder was not against the manifest weight of the evidence.³ The jury was entitled to find the testimony of the state's two independent witnesses more credible than the testimony

² See *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

³ *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

offered by Payne and his family members. Payne argues that the testimony of Coleman and Whitehead did not align with the coroner's testimony. We disagree. Both Coleman and Whitehead indicated that Payne had fired at Phifer as he lay collapsed in Coleman's yard. Whitehead further indicated that Phifer had placed his hands up in an attempt to block the gunshots. This was consistent with Deputy Coroner Stephens' testimony that Phifer had suffered a defensive wound to his right middle finger. And Stephens further indicated that Phifer had not been shot from a distance closer than two feet. This testimony was not contradicted by that offered from the state's witnesses. The jury could reasonably have found that Payne had stood over Phifer and fired at him from a distance farther than two feet.

Payne's conviction for having a weapon while under a disability was also supported by sufficient evidence and was not against the manifest weight of the evidence.⁴ Payne had stipulated to his prior conviction for possession of drugs, and the evidence revealed that Payne had knowingly carried and used a firearm.

Accordingly, the first two assignments of error are overruled.

In his third assignment of error, Payne argues that the trial court erred in imposing a sentence greater than that permitted by the jury's verdict.

Payne was indicted on a gun specification that required the imposition of a mandatory three-year sentence. Pursuant to R.C. 2941.145, the indictment alleged that Payne "did have on or about his person, or under his control, a firearm while committing the offense of Aggravated Murder and displayed the firearm, brandished the firearm, indicated that he possessed a firearm or used it to facilitate the offense." The trial court's instruction to the jury comported with the language in the indictment. But the verdict form provided to the jury only stated that Payne had "on or about his

⁴ See R.C. 2923.13(A)(3).

person, or under his control, a firearm while committing the offense of aggravated murder.” The verdict form omitted any mention of brandishing or displaying the firearm and, pursuant to R.C. 2941.141, only required the imposition of a mandatory one-year sentence. The jury found Payne guilty of the gun specification, and the trial court imposed a consecutive term of three years’ imprisonment.

Payne now argues that, based on the language of the verdict form, the trial court was only permitted to impose a one-year sentence on the specification because the jury never found that Payne had brandished or displayed the weapon. We agree. Because Payne failed to object to the verdict form in the trial court, we review for plain error.⁵

Although we believe that the record contains ample evidence to support the gun specification contained in the indictment, we are bound by the documents in the record, including the verdict form. The jury was only charged on a one-year gun specification pursuant to R.C. 2941.141. The jury never found that Payne had brandished or displayed a weapon, and a holding by this court to the contrary would usurp the jury’s role as fact-finder. Consequently, we are constrained to sustain Payne’s assignment of error. Based on the verdict form, the trial could only have imposed one year’s imprisonment for the specification. The imposition of a consecutive term of three years’ imprisonment was in error.

In his fourth assignment of error, Payne argues that his trial counsel, who is also his appellate counsel, was ineffective. He first argues that his counsel was ineffective for failing to adequately investigate the case. Specifically, Payne claims that counsel should have further looked into a 911 call made the day prior to Phifer’s shooting that allegedly referred to Payne. During her testimony, Rose Coleman had indicated that Phifer’s shooter was the same man whom the police had been looking for a day earlier

⁵ See *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶133.

regarding a separate shooting. Payne asserts that his counsel should have conducted a more adequate investigation and obtained a record or report regarding this prior call. Payne's contention is untenable. Although this prior emergency call is mentioned in the record, Payne's claim cannot be substantiated without relying on matters outside the record. It cannot be demonstrated in a direct appeal, and we cannot find counsel ineffective on this ground.

Payne next argues that his counsel was ineffective for failing to object to an entire line of questioning regarding the prior emergency call and the separate shooting. This argument is equally untenable. Given the ample evidence of Payne's guilt, including eyewitness identification from two separate persons, we conclude that Payne was in no manner prejudiced by counsel's failure to object to questioning regarding the prior emergency call and shooting.⁶ Payne's fourth assignment of error is overruled.

In summary, we modify Payne's sentence on the gun specification from three years' imprisonment to one years' imprisonment to properly reflect the finding made by the jury. Payne's aggregate sentence is now 31 years' to life imprisonment. The judgment of the trial court is otherwise affirmed.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

SUNDERMANN, P.J., HENDON and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on July 28, 2010
per order of the Court _____.
Presiding Judge

⁶ See *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052.